# STATE OF MICHIGAN

# COURT OF APPEALS

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CAROL ANN ESTAPA,

Plaintiff-Appellant,

v

ALTERNATIVE COMMUNITY LIVING, INC., d/b/a NEW PASSAGES,

Defendant-Cross-defendant-Appellee,

and

GORDON PROPERTIES,

Defendant-Cross-plaintiff-Appellee.

UNPUBLISHED
February 13, 2014

No. 309270
Macomb Circuit Court
LC No. 2009-004945-NO

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CAROL ANN ESTAPA,

Plaintiff-Appellee,

v

GORDON PROPERTIES,

Defendant-Appellant.

No. 310566
Macomb Circuit Court
LC No. 2012-000215-NO

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Before: MURPHY, C.J., and DONOFRIO[1] and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 309270, plaintiff appeals as of right the order dismissing her action against defendants Alternative Community Living, Inc. (ACLI), and Gordon Properties (Gordon). In Docket No. 310566, Gordon appeals by leave granted the order denying its motion for summary

[1] Donofrio, J. did not participate.

disposition. This Court consolidated these appeals. *Estapa v Alternative Community Living, Inc* and *Estapa v Gordon Props*, unpublished order of the Court of Appeals, entered July 13, 2012 (Docket Nos. 309270 and 310566). We affirm the order dismissing plaintiff's action against ACLI and Gordon in Docket No. 309270, and reverse the order denying Gordon's motion for summary disposition of plaintiff's claims in Docket No. 310566.

This case arises out of plaintiff's slip and fall on ice on property owned by Gordon and leased to ACLI. On January 22, 2009, plaintiff arrived at ACLI's offices for a scheduled appointment and entered an ACLI building, where she learned that her appointment was in a different building in the office complex. A receptionist led plaintiff to a backdoor of the building, directing her to exit the door and providing directions to the correct building for plaintiff's appointment. The receptionist and plaintiff were also accompanied by ACLI's program director, who warned plaintiff to watch her step as she exited the building, as one had to "step down" to exit. Plaintiff opened the backdoor and stepped onto a short sidewalk, where she immediately slipped on some ice, struck her head against a wall, and landed on her tailbone. At the time of the fall, plaintiff had been looking straight ahead and thanking the receptionist and program director for their assistance. The ice had formed on the sidewalk from water dripping from a roof. After the fall, plaintiff could see the ice upon which she slipped. Plaintiff indicated that had she looked down before falling, she "[d]efinitely" would have seen the ice. After being assisted by the ACLI personnel upon falling, plaintiff proceeded to her appointment and subsequently drove home, at which time she started to feel severe pain in her back.

## I. DOCKET NUMBER 309270

In November 2009, plaintiff filed her complaint, alleging two counts of "negligence," one against ACLI and one against Gordon, with the allegations sounding in premises liability. Embedded in the complaint was also a claim of a statutory violation under MCL 125.471, which requires "dwellings" to be kept in good repair. ACLI and Gordon moved for summary disposition, arguing that plaintiff's action was barred by the open and obvious danger doctrine and that MCL 125.471 was inapplicable, given that the building where the fall occurred did not qualify as a dwelling, as it was not residential in nature, MCL 125.402. In June 2011, the trial court denied ACLI and Gordon's motion for summary disposition, finding that there was a genuine issue of material fact regarding whether the ice accumulation on which plaintiff fell was open and obvious. The court did not address an argument posed by plaintiff that she had pleaded ordinary negligence, as well as premises liability. This Court issued a peremptory order reversing the trial court's order and holding, under the open and obvious danger doctrine, that "defendants were entitled to summary disposition of plaintiff's *claims* under MCR 2.116(C)(10)." *Estapa v Alternative Community Living, Inc*, unpublished order of the Court of Appeals, entered August 5, 2011 (Docket No. 304734) (emphasis added). This Court's records reflect that plaintiff did not file a motion for reconsideration, nor did she seek leave to appeal in the Michigan Supreme Court. Thereafter, the trial court issued an order of dismissal.

Plaintiff appeals, arguing that the preemptory order did not decide her ordinary negligence claim. However, the plain and unambiguous language of this Court's order did not exempt any claim; it effectively granted summary disposition with respect to all claims alleged by plaintiff and ended the case. The law of the case doctrine prohibited the trial court from resurrecting any cause of action. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595

(2002) (this Court's ruling in a case binds lower tribunals on remand). Procedurally speaking, plaintiff needed to challenge this Court's peremptory order if she was unhappy with the ruling, which was not done. Plaintiff adamantly contends that, because this Court's peremptory order relied on the open and obvious danger doctrine, the order clearly did not reach any alleged ordinary negligence claim, given that the doctrine does not apply to an ordinary negligence action. See *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). Again, the peremptory order summarily dismissed plaintiff's "claims" with respect to a two-count complaint, and to the extent that there was any legal error in the panel's ruling, reconsideration or an application for leave should have been pursued. Moreover, despite plaintiff's contentions, her lawsuit was a premises liability action. When an injury arises from a condition of the land, the action sounds in premises liability, even if the premises possessor created the hazardous condition giving rise to the injury and regardless of what label the plaintiff gives the action. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012), citing *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). A plaintiff may claim ordinary negligence for the overt acts of a premises owner; however, an icy surface is a condition of the land. *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 913-914; 781 NW2d 806 (2010) (reversing this Court's ruling which found that an ordinary negligence claim had been pled, where the defendant knew about a malfunctioning heating system in a carwash bay that created the icy surface upon which the plaintiff fell, and where the defendant allowed and did not prevent the plaintiff's use of the bay).[2] Here, the only act plaintiff alleged outside the maintenance of the property and walkways and failure to warn of icy conditions was the act of guiding her to the backdoor and having her use the sidewalk, which did not support an ordinary negligence claim, given that, as in *Kachudas*, it was ultimately the slip and fall on an icy surface, i.e., a condition of the land, that gave rise to plaintiff's injuries.

In sum, the trial court did not err in dismissing the action, which already had essentially been dismissed by this Court.

## II. DOCKET NUMBER 310566

After the entry of this Court's peremptory order in the first lawsuit and the trial court's subsequent order of dismissal, and while a motion for reconsideration of the dismissal order was pending, plaintiff filed a new action against Gordon. In this second lawsuit, plaintiff alleged that Gordon breached its duty to maintain the premises in a safe condition by failing to correct the problem of water running off the roof and freezing on the pavement. As part of that claim, plaintiff alleged that Gordon had violated the Stille-DeRossett-Hale single state construction code act, MCL 125.1501 *et seq*., and local township ordinances. Additionally, plaintiff alleged a breach of contract claim, under a third-party beneficiary theory, maintaining that Gordon breached a provision in the lease with ACLI to maintain and repair the building's roof.

[2] These underlying facts are found in *Kachudas v Invaders Self Auto Wash, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2009 (Docket No. 281411).

The trial court denied Gordon's motion for summary disposition, which had raised arguments predicated on res judicata, collateral estoppel, and the limited scope of third-party beneficiary rights.

An action is barred by res judicata when a prior action was decided on its merits, the same parties or their privies were involved in the prior action, and the issue was or could have been resolved in the first action. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). A ruling on a motion for summary disposition is the equivalent of a trial on the merits and bars relitigation on res judicata principles. *Capital Mtg Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). The only question in the present case was whether all of the claims could have been resolved in the first action.

Res judicata bars any claim arising out of the same transaction or events that formed the basis of the original litigation and which could have been raised in the first action had reasonable diligence been exercised. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999), quoting *Hackley v Hackley*, 426 Mich 582, 585; 395 NW2d 906 (1986). This is in contrast to collateral estoppel, which only bars issues that were actually litigated in the prior action. *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010). When determining whether the issue could have been resolved in the first action, we use a transactional test, which analyzes whether the facts are related in time, space, origin, or motivation. *Washington*, 478 Mich at 420, quoting *Adair v State*, 470 Mich 105, 124-125; 680 NW2d 386 (2004).

Plaintiff's new claims all stem from the same slip and fall accident. Through reasonable diligence, plaintiff would have been able to determine which statutes or township ordinances supposedly applied to the building and determine the obligations set forth in the lease between ACLI and Gordon, even before she filed her original complaint. Further, plaintiff made no attempt to amend her complaint in the first action. Her initial complaint also referenced the roof run-off issue that she raised in the second complaint. Plaintiff's claims are all barred by res judicata. The trial court erred when it denied Gordon's motion for summary disposition. We reverse and remand for entry of judgment dismissing plaintiff's case in full. Given our ruling, we need not analyze the other issues raised on appeal regarding collateral estoppel and third-party beneficiary status.

We affirm in Docket No. 309270, and reverse and remand for entry of judgment in favor of Gordon in Docket No. 310566. We do not retain jurisdiction. Having fully prevailed on appeal, ACLI and Gordon are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Karen M. Fort Hood

Donofrio, J. did not participate.